STATE OF MICHIGAN

COURT OF APPEALS

MARIE CECILIA SEYMOUR,

Plaintiff-Appellant,

v

GARRY WEINBERG,

Defendant/Third-Party Plaintiff-Appellee,

v

DOUGLAS A. SEYMOUR,

Third-Party Defendant.

UNPUBLISHED
May 17, 2005

No. 251924
Oakland Circuit Court
LC No. 2002-041694-CK

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a final order dismissing defendant's third-party claims without prejudice. Plaintiff raises issues related to orders denying her motion for summary disposition and granting defendant's motion for summary disposition. Specifically, plaintiff argues that the trial court erred in holding that a personal guaranty ("the Guaranty") signed by defendant was ambiguous, and that even if it was ambiguous, the trial court erred in holding that the ambiguity rendered the Guaranty unenforceable as a matter of law. We affirm.

I. Standards of Review

We review de novo a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion for summary disposition, we consider the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

We review de novo the proper construction and interpretation of a contract. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The primary goal of contract interpretation is to determine and enforce the parties' intent by

reading the agreement as a whole and attempting to apply the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). When a contract is ambiguous, we may construe the agreement in an effort to find and enforce the parties' intent. *Id*. "In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction." *Id*., quoting *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887 (1997).

II. Analysis

The parties do not dispute the existence of the Guaranty, but rather, its scope. It is undisputed that defendant executed a promissory note for $95,000 for the original loan, and that defendant signed the Guaranty, which provides, in pertinent part:

> In consideration of any credit or other financial accommodation extended by MARIE CECILIA SEYMOUR, of Berkley, Michigan, ("Creditor"), to SEYBERG CONSTRUCTION, LLC of Southfield, Michigan ("Debtor"), the undersigned ("Guarantor") absolutely, unconditionally, and irrevocably guarantees prompt payment when due and at all times in the future of the indebtedness evidenced by a certain promissory note dated the 25th day of September, 1996 in the original principal amount of Ninety Five Thousand Dollars ($95,000.00), executed by Debtor, and any extensions, renewals, and modifications made to the Note, and all interest accrued on it (collectively the "*indebtedness*"). *The indebtedness includes all indebtedness and all obligations owing now or in the future of Creditor by Debtor*, regardless of whether any such indebtedness or obligation is (a) not presently intended or contemplated by Debtor, Creditor, or Guarantor; (b) indirect, contingent, or secondary; or (c) unrelated to, or of a different kind or class from, any indebtedness or obligations of Debtor to Creditor that are now owing or are committed or contemplated. [Emphasis added.]

After examining the plain language of the Guaranty, we agree with the trial court's ruling that the Guaranty was ambiguous regarding its scope. A review of the first paragraph reveals its ambiguous use of the term "indebtedness." The Guaranty defines "indebtedness" in its first sentence of the first paragraph to include plaintiff's original $95,000 loan to Seyberg Construction Company, L.L.C. ("Seyberg"), evidenced by the promissory note. The promissory note refers only to the principal sum of $95,000, which defendant has already paid in full, with interest. In its second sentence of the first paragraph, however, the Guaranty redefines "indebtedness" to include "all indebtedness and obligations owing now or in the future to Creditor by Debtor." We reject the contention that the second sentence guaranteeing "all indebtedness and obligations owing now or in the future" expands the definition of the "indebtedness" in the first sentence. We find that the "indebtedness" for all future loans in the second sentence "irreconcilably conflicts" with the "indebtedness" for the original $95,000 loan in the first sentence creating ambiguity in the scope of the Guaranty. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) ("if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous"). Indeed, the cases on which plaintiff relies to support her position recognize the principle that a contract is ambiguous when its provisions are capable of conflicting interpretations. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Raska v Farm Bureau Mut Ins*

Co of Michigan, 412 Mich 355, 361-362; 314 NW2d 440 (1982). As such, we hold that the trial court properly found that the contradiction between the two sentences at issue created ambiguity in the Guaranty. *Wilkie*, *supra* at 47; *Raska*, *supra* at 361-362.

Despite the ambiguity in the Guaranty, plaintiff insists that, pursuant to *Wilkie* and *Raska*, this Court should "read [the] contract[] as a whole, giving harmonious effect . . . to each word and phrase," *Wilkie*, *supra* at 50 n 11, and that even an "inartfully worded or clumsily arranged" contract may not be ambiguous or "fatally unclear" if it "fairly admits of but one interpretation." *Raska*, *supra* at 362.[1] This may be particularly true where the case involves the resolution of ambiguities in an insurance contract as in *Wilkie* and *Raska*. When an insurance contract contains ambiguous terms, we must construe the contract against the drafter and in favor of the insured. *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003).

This case, however, involves a guaranty contract. A guaranty contract, like a surety contract, is a special kind of contract that must receive strict construction in favor of the surety. *Bandit*, *supra* at 511. A strict construction of the Guaranty in favor of defendant requires only the original $95,000 loan to fall within the precise definition of the term "indebtedness" in the first sentence. Our Supreme Court in *Bandit* noted that "[t]he liability of a surety is not to be extended by implication beyond the terms of his contract." *Id*. at 511-512, quoting *City of Ann Arbor v Massachusetts Bonding & Ins Co*, 282 Mich 378, 380; 276 NW 486 (1937). Further, the Court noted that "assumption of another's debt is a substantial undertaking, and thus the courts will not assume such an obligation in the absence of a clearly expressed intention to do so." *Id*. at 512.

Here, the Guaranty ambiguously uses the term "indebtedness" throughout its provisions. In addition to the phrase "indebtedness includes all indebtedness and obligations," the Guaranty refers to "the indebtedness or . . . other components of the indebtedness" in the fourth paragraph, and "any indebtedness or any setoff" in the eleventh paragraph. Thus, it is unclear on the Guaranty's face whether the parties intended to include plaintiff's subsequent loans beyond the original $95,000 loan within the scope of Guaranty. At minimum, such ambiguity in the language of the Guaranty does not evidence defendant's "clearly expressed intention" to guarantee plaintiff's subsequent loans. *Id*. As such, we find that the trial court correctly determined that the Guaranty is ambiguous regarding its scope.

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[1] We note that even reading the first and second sentences of the first paragraph of the Guaranty in harmony as plaintiff urges does not provide plaintiff any relief. The first sentence clearly defines the indebtedness to include the original promissory note, along with any "extensions, renewals, and modifications" made to the note. Thus, the second sentence concerning "all indebtedness" merely would apply to any further indebtedness arising out of such extensions, renewals, or modifications to the original note. Because, as plaintiff admits, the later loans to the business venture were not made pursuant to any such extensions, renewals, or modifications, even the second sentence's language regarding "all indebtedness" would not cover the contested loans made here.

Plaintiff next argues that, even if the Guaranty was ambiguous, the trial court erred in ruling that it was unenforceable as a matter of law. We disagree. Our Supreme Court in *Bandit* made it clear that "a personal guarantee for the debt of another can arise only where such an intent is clearly manifested." *Bandit, supra* at 505. As discussed previously, defendant's clearly expressed or manifested intent to guarantee any future loans is absent because of the ambiguity in the language of the Guaranty. Without defendant's clearly manifested intent, the Guaranty is invalid as a matter of law.

Plaintiff primarily relies on *Klapp, supra* at 469, to argue that the ambiguity in the contract regarding the parties' intent must be left for a jury to decide. However, plaintiff's argument is without merit because this case involves a guaranty contract where the need for the guarantor's "clearly manifested" intent is "more fundamental" than searching for the parties' intent. *Bandit, supra* at 512-513. The Court in *Bandit* recognized the general principle that the intention of the parties must be given effect. *Id*. at 513. However, the Court held that the more fundamental principle of law that "[t]he rights of sureties are always favored in the law, and persons standing in that relation in this class of obligations will not be held, unless an intention to bind themselves is clearly manifested" must take precedence. *Id*., quoting *The Columbus Sewer Pipe Co v Ganser*, 58 Mich 385, 391; 25 NW 377 (1885). Accordingly, absent a "clearly manifested intent," defendant cannot be held personally liable for plaintiff's subsequent loans as a matter of law, *Bandit, supra* at 505, and there is no further need for a jury to decide the meaning of the ambiguous contract under *Klapp, supra* at 469.

Plaintiff further contends that *Bandit* is not applicable here because it deals with an issue of contract formation, as opposed to contract interpretation. We disagree. Our Supreme Court in *Bandit, supra* at 513, cited *Columbus Sewer Pipe* in its decision and made no distinction between the contract formation issue in *Bandit* and the contract interpretation issue in *Columbus Sewer Pipe*. The *Bandit* Court recognized that the principles enunciated in *Columbus Sewer Pipe*, *supra* at 391 (that a guarantor is not liable beyond the express terms of his contract, and that the terms are not to be construed technically to the disadvantage of the sureties and contrary to their intent), have been in place in Michigan for over a century. *Bandit, supra* at 512-513. The *Bandit* Court applied these principles to reach its decision that a guaranty contract cannot be implied from language that fails to clearly manifest an intention to assume another's debt. *Bandit, supra* at 513-514. Thus, as the trial court found, plaintiff's attempt to distinguish the contract formation case and the contract interpretation case is "not compelling." *Columbus Sewer Pipe* and *Bandit* are applicable because this case deals with the similar issue of whether a guarantor's liability can be implied from the ambiguous language in the contract. Accordingly, we hold that the trial court did not err in relying on *Bandit* and *Columbus Sewer Pipe* to support its holding that absent "clearly manifested intent to be bound with regard to the subsequent debts," plaintiff's claim to recover her subsequent loans to Seyberg must fail as a matter of law.

We affirm.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra